

ARIZONA SUPREME COURT

STATE OF ARIZONA,

Appellee,

vs.

CLARENCE WAYNE DIXON,

Appellant.

No. CR–08–0025–AP

Maricopa County Superior Court No.
CR–2002–019595

Ninth Circuit No. 16–99006

U.S. District Court No. CV–14–258–
PHX–DJH

**RESPONSE TO MOTION TO
MODIFY BRIEFING SCHEDULE
AND CROSS MOTION TO
VACATE OR STAY BRIEFING
SCHEDULE**

(Capital Case)

Clarence Wayne Dixon, through undersigned counsel, hereby responds to the State of Arizona’s Motion to Modify Briefing Schedule which was filed and served on June 22, 2021. *See* Motion to Modify Briefing Schedule, *State v. Dixon*, No. CR–08–0025–AP (Ariz. June 22, 2021) [hereinafter Mot. to Modify]. Mr. Dixon also cross-moves to vacate or stay the briefing schedule for the State’s Motion for Warrant of Execution [hereinafter Warrant Motion], *see* Order, *State of Arizona v. Clarence Wayne Dixon*, No. CR–08–0025–AP (Ariz. May 21, 2021) [hereinafter Order].

First, by way of response to the State’s motion, Mr. Dixon objects to the State’s request that the Court suspend operation of its rules to afford him just four days to respond to the State’s Warrant Motion and then leave insubstantial time for this Court to determine the contested issues of fact and law that are certain to be presented. *Compare* Ariz. R. Civ. App. P. 6(a)(2) (affording “[a]ny party . . . 10 days after service of [a] motion” to file a response), *with* Mot. to Modify at 3 (proposing a four-day deadline for Mr. Dixon’s response). This foreshortened period contravenes this Court’s rules and the established briefing schedule in this matter.¹ Order, *supra*.

This truncated briefing schedule is necessary, the State argues, owing to “highly extraordinary circumstances.” Mot. to Modify at 1. But those circumstances are of the State’s own making:

- The State has sole knowledge of and control over its supply of lethal injection drugs;
- The State selected and retained the compounding pharmacist to prepare the execution drugs, *see, e.g.*, Mot. to Modify at 2; and
- The State chose the date to file its original request for a briefing schedule on a warrant of execution in this matter, and apparently did so based on what now

¹ The State initially asked this Court to afford Mr. Dixon a single day to respond to its Warrant Motion. Motion to Set Briefing Schedule for Motion for Warrant of Execution, *State v. Dixon*, No. CR–08–0025–AP (Ariz. Apr. 6, 2021) [hereinafter Mot. for Briefing Schedule]. This Court rejected that request, applied its rules, and set a briefing schedule that affords Mr. Dixon his right to 10 days—excluding intermediate weekends—in which to respond to the State’s Warrant Motion. *See* Order, *supra*.

proves to be mistaken and unreliable information provided by its selected pharmacist, *see* Mot. to Modify at 2–3; *see also* Mot. for Briefing Schedule at 2 (avowing that “based on current testing, the drug has a beyond-use date (aka expiration date) of 90 days from the date of compounding”).

Despite these serious and troubling malfunctions in its preparation for executing prisoners,² the State now asserts that truncating Mr. Dixon’s right to respond—and this Court’s time to deliberate and decide—is necessary because it recently learned that its retained pharmacist had made serious errors: it belatedly discovered that the compounded drug to be used in Mr. Dixon’s execution does not have a 90-day beyond-use date, as he/she earlier represented, and will allegedly

² The revelation that the compounding pharmacist retained by ADCRR provided an incorrect initial beyond-use date that precipitated the State’s pursuit of Mr. Dixon’s execution, *see* Mot. to Modify at 2, is the latest manifestation of ADCRR’s troubling historical practice of using unreliable drugs and drug sources to carry out executions. In 2010, for example, ADCRR used thiopental that—it was later learned—had been secretly imported in violation of federal drug laws to execute Jeffrey Landrigan. *See Landrigan v. Brewer*, No. CV–10–02246–PHOENIX, AZ 85007–ROS, 2010 WL 4269559, at *12 (D. Ariz. Oct. 25, 2010) (enjoining Arizona from executing Landrigan “to allow the Court to fully consider his challenge to Arizona’s use of sodium thiopental from an unidentified, non-FDA approved source”), *vacated*, 562 U.S. 996 (2010). Subsequently, a district court determined that the importation of sodium thiopental violated the Food, Drug, and Cosmetic Act and permanently enjoined the FDA’s importation of the drug. *See Beaty v. Food & Drug Admin.*, 853 F.Supp.2d 30 (D.C. Cir. 2012), *vacated in part sub nom. Cook v. Food & Drug Admin.*, 733 F.3d 1, 12 (D.C. Cir. 2013). In 2015, despite that injunction, ADCRR again attempted to purchase and illegally import sodium thiopental, at a cost of \$26,700, from an unlicensed supplier in India; the federal government refused to allow the drug shipment into the country. Chris McDaniel & Chris Geidner, Arizona, Texas Purchased Execution Drugs Illegally Overseas, But FDA Halts The Import, BUZZFEED NEWS (Oct. 22, 2015), <http://www.buzzfeed.com/chrisgcdaniel/arizona-texas-purchased-execution-drugs-illegally>.

expire before the “anticipated execution on October 19.” Mot. to Modify at 3. The State maintains that only through “specialized testing” that “has not yet commenced and will not be completed in time to accommodate the briefing schedule,” will the State’s compounding pharmacist be able to determine whether the drug’s beyond-use date extends beyond 45 days. *Id.* at 2–3.

The State’s reasons for modifying the briefing schedule are inadequate. The present dilemma was created by the State by prematurely seeking a briefing schedule to support issuance of a warrant for Mr. Dixon’s execution, without first obtaining reliable data essential to carrying out a lawful execution. The solution to the State’s unpreparedness is not to violate Mr. Dixon’s rights by suspending the operation of this Court’s rules, or to compromise the time the Court has to deliberate. Moreover, the State’s confidence that this Court will simply rubber stamp the warrant request on its proposed accelerated schedule is unseemly.

Because the State was precipitous in its earlier request for a briefing schedule and it still has not conducted testing to reliably determine the shelf-life of its execution drugs,³ the Court should vacate the briefing schedule on the State’s

³ The State’s pursuit of Mr. Dixon’s execution before the shelf-life of the drugs to be used in his execution was reliably determined through all requisite testing, together with its belated request to now alter the established briefing schedule on its warrant for Mr. Dixon’s execution in a manner that would violate Mr. Dixon’s responsive rights, manifests yet another troubling historical practice: the State’s decades-long, haphazard approach to implementing its execution protocol including through last-minute, ad hoc changes. *See, e.g., West v. Brewer*, No. CV–11–1409–

Warrant Motion, or stay the same, and order to State to refile its Motion for Briefing Schedule at such a time as it is prepared to pursue Mr. Dixon’s execution in a manner consistent with his state and federal rights. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”); *Samiuddin v. Nothwehr*, 243 Ariz. 204, 211 (2017); U.S. Const. amend. XIV; Ariz. Const. art. II, § 4.

For the foregoing reasons, Mr. Dixon asks that the Court vacate—or, in the alternative, stay—the briefing schedule on the State’s Motion for Warrant of Execution until the State is prepared to pursue his execution without violating his state and federal rights.

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PHX–NVW, 2011 WL 6724628, *5 (D. Ariz. Dec. 21, 2011) (recognizing that “the night before the scheduled execution of Arizona prisoner Donald Beaty, ADC[RR] notified Beaty and the Arizona Supreme Court that it intended to substitute pentobarbital for sodium thiopental in carrying out Beaty’s execution”); *Towery v. Brewer*, 672 F.3d 650, 652–53 (9th Cir. 2012) (per curiam) (addressing ADCRR’s change to its lethal injection protocol two days before the scheduled execution of Robert Moormann, and explaining that “[h]ow such a discovery escaped the State for the past six weeks is beyond us, and gives us pause as to the regularity and reliability of Arizona’s protocols[]”); Tom Dart, Arizona inmate Joseph Wood was injected 15 times with execution drugs, *The Guardian* (Aug. 2, 2014), <https://www.theguardian.com/world/2014/aug/02/arizona-inmate-injected-15-times-execution-drugs-joseph-wood> (reporting on the State’s last-minute, unilateral deviation from its execution protocol during the execution of Arizona prisoner Joseph Wood by administering 15 doses of a drug combination that left Mr. Wood “gasping and gulping[]” for nearly two hours before he died).

RESPECTFULLY SUBMITTED this 6th day of July, 2021.

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